

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 427 of 1977

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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BAI JALU W/O GOVIND LAKHA

Versus

BAI MOTI NARSINH KARADIA

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Appearance:

MR SURESH M SHAH for Petitioner  
MR DEEPAK M SHAH for Respondent No. 1  
MR RA MISHRA for Respondent No. 2, 3

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 03/07/97

ORAL JUDGEMENT

1. The appellant (original defendant no.1) has brought under challenge the judgment and decree dated 8/2/1977 rendered by the learned Civil Judge (Senior Division) at Junagadh in Special Civil Suit No. 30 of 1972, which was filed by the respondent no.1 (plaintiff) for partition of her one half share of her deceased son

in the suit property and for mesne profits as well as for separate possession of her share. The learned trial Judge passed preliminary decree in following terms :-

"The plaintiff's suit is decreed and it is hereby declared that the plaintiff as an heir of the deceased Parbat Arjan has one half share in the suit property consisting of S.No. 68 of Chandigadh (Chandvana) admeasuring 7 acres and 37 gunthas, the land of Bhandarwadi of S.No. 92 admeasuring 6 vigas and one half share in the one half share of the deceased defendant no.1 each in the house in plot consisting of two rooms and a plot and one half share in the house in a village. The said property be partitioned and the plaintiff be put in possession of her one half share. The plaintiff will also recover the mesne profits of her one half share in the said property from the date of suit till recovery of possession or the expiration of 3 years from the date of decree whichever event first occurs.

The decree should be sent to the Collector for partition of the agricultural land. The commissioner be appointed for partition of the remaining property. The inquiry be made through the commissioner as to rent or mesne profits from the institution of the suit until the delivery of possession to the plaintiff or the expiration of three years from the date of the decree whichever event first occurs.

The defendant Nos. 3, 4 shall pay the costs of the plaintiff and shall bear their own costs. The defendant no.1 shall bear her own costs.

The preliminary decree be drawn accordingly."

2. The deceased defendant no.1 (appellant's predecessor) resisted the suit as per written statement exh.8 inter-alia contending that Parbat had died and the plaintiff had taken divorce many years ago and, therefore, the plaintiff had no right to file the suit. However, admitted that defendants had agricultural land and houses as stated by the plaintiff while denying that the share of Parbat in the property was recognised in writing. He admitted that the property was partitioned, but he denied the details given by the plaintiff. He admitted that Parbat had died, but he denied that Parbat was murdered. He admitted that the land stood jointly in the names of the defendants.

3. The deceased defendant no.2 and defendants nos. 3 and 4 in their written statement exh. 9 further contended that the deceased defendant no.1 executed will and got registered on 25/3/1974 bequeathing all his properties to the defendant no.3 who had become the exclusive owner of the suit property.

4. The plaintiff had withdrawn the suit against the deceased defendant no.2 and his heirs and legal representatives.

5. Following issues were raised at exh. 11 :-

- (i) Whether the plaintiff is entitled to file the present suit ?
- (ii) Whether any cause of action has accrued to the plaintiff ?
- (iii) Whether the plaintiff proves that the deceased Parbat has any share in the properties of defendant No. 1 ?
- (iv) Whether the plaintiff proves that the defendant No.1 has admitted the share of deceased Parbat in his properties at the time of divorce with the plaintiff ?
- (v) Whether the plaintiff proves that the defendants own properties as described by her ?
- (vi) Whether the plaintiff proves that she is the only heir of the deceased Parbat Arjan ?
- (viA) Whether the defendant No.1 has executed will bequeathing his property in favour of the defendant No.3 ? If yes, whether defendant no.1 was competent to do so ?
- (vii) Whether the suit is valued properly for the purposes of court fees and jurisdiction and whether court fees paid are sufficient ?
- (viii) Whether the plaintiff is entitled to any of the reliefs prayed for ?
- (ix) What order and Decree ?"

Answering the first 6 issues in affirmative, issue no. 6A first part in the affirmative, issue no. 6A second part in negative and issue no. 7 in the affirmative, the learned trial Judge held that the plaintiff was entitled to partition and separate possession of one half share in survey no. 68/92 and house and mesne profits from the date of the suit. The learned trial Judge passed preliminary decree as reproduced hereinabove.

6. This appeal came up for final hearing before this Court. Mr. S.M. Shah, learned advocate appearing for

the appellant drew the attention of this Court that First Appeal No. 224 of 1977 was filed by original defendant no.3 Karadia Ranmal Bhagwan against the impugned judgment and order and the same was disposed of at the admission stage. Hence, the papers of First Appeal No. 224 of 1977 were called for. They are now before this Court. It appears therefrom that by oral order dated 15/3/1977 (Coram : D.P. Desai and M.P. Thakkar, as their Lordships then were, per Desai, J.) rejected the First Appeal observing that there was no arguable question of law or fact arising in the matter and that there was clearly an admission made by deceased Arjan Laxman in the deed of divorce exh. 51 executed in the year 1954 that the properties in his hands were ancestral properties and that Parbar had a share therein and that he would give the same to Parbar and that even in revenue records names of Arjan, i.e. the father of Parbat and the defendant no. 2 Dana Laxman were entered way back in 1959 and that originally all the properties were running in the names of defendants nos. 3 and 4. Under such circumstances the learned trial Judge was held to be quite right in negating the belated contention raised at the time of arguments that under law prevailing in the then Junagadh State the Collector had only a personal right to occupy the properties for his life time and had no interest therein. The Bench held that there was no scope for this contention being raised as the same had not been investigated during the trial having not been canvassed by proper pleadings in that respect. Seeing no substance in the appeal the Bench rejected the same summarily.

7. The papers of the aforesaid appeal further reveal that the matter was taken before the Hon'ble Supreme Court in Civil Appellate Jurisdiction in Civil Appeal No. 2045 of 1977 wherein the Hon'ble Supreme Court has passed following order on 21/11/1995 :-

"Mr. Adhyaru, learned counsel representing the appellant herein, avers that the cognate matter being C.A. No. 866/77 has since been dismissed by this Court, accordingly, the instant appeal may also be dismissed. The appeal is, therefore, dismissed on his statement."

8. The result of the aforesaid development regarding the other appeal against the impugned judgment and decree would be that even this appeal will have to meet with the same fate.

9. It has, however, been submitted on behalf of the appellant that the learned trial Judge ought to have

issued appropriate direction to separate the share of the appellant while issuing direction to separate the share of respondent no. 1 (plaintiff). In my opinion, it would be open to the appellant to move the trial Court by way of an appropriate application before the learned trial Judge for passing further decree either preliminary or final in nature, for separating the appellant's share in the property/properties in question as per the declaration of shares set out by the learned trial Judge.

In the result and in view of the above observation, no further orders are necessary in this appeal and the same is required to be dismissed. The appeal is accordingly dismissed with no order as to cost.

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